STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 7, 2003
v	No. 240732 Genesee Circuit Court
TIMOTHY MICHAEL JACKSON, Defendant-Appellant.	LC No. 01-008219-FH

Before: Bandstra, P.J., and White and Donofrio, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of forty-one counts of arson of a dwelling, MCL 750.72. He was sentenced as a third habitual offender, MCL 769.11, to concurrent prison terms of fifteen to forty years for each conviction. He appeals as of right. We affirm.

Defendant set a fire in his estranged wife's apartment unit. In a statement to the police, defendant said that he set a sweater on fire, and the fire burned out of control. According to arson investigators, however, evidence consistent with the use of accelerants was discovered in numerous locations throughout the apartment unit, although the accelerants themselves had probably been consumed by the fire. Fueled by high winds, the fire spread to forty-one units of the apartment complex.

I. Effective Assistance of Counsel

Defendant first argues that the trial court abused its discretion in denying his motion for resentencing on the ground that he was denied the effective assistance of counsel in connection with his decision to withdraw a no contest plea to the charged offenses. Defendant asserts that he would have received a minimum sentence of ten years for each conviction, rather than the minimum term of fifteen years that he ultimately received, had he not withdrawn his plea on the advice of counsel.

On the date originally scheduled for trial, defendant pleaded "no contest" to the charges pursuant to a *Cobbs*[1] sentencing agreement whereby the court tentatively agreed to impose a minimum sentence not to exceed seventy-eight months. Subsequently, at sentencing, the court indicated that it could not abide by the *Cobbs* agreement and instead would impose a minimum sentence of ten years. Defendant elected to withdraw his plea and proceed to trial.

After he was convicted and sentenced defendant moved for resentencing, arguing that he was denied the effective assistance of counsel in connection with his decision to withdraw his no contest plea. Defendant asserted that his trial counsel had informed him that, if he proceeded to trial, he would be entitled to a jury instruction on the lesser offense of burning personal property, i.e., the sweater, MCL 750.74, which carried a lower penalty. Defendant also asserted that counsel informed him that, in any event, even were he to be convicted of the charged offenses, the trial court would likely not impose a sentence greater than the ten years originally offered.

When discussing the proposed jury instructions at trial, defense counsel requested that the court give CJI2d 31.4 (burning personal property). The introductory language for that instruction indicates that burning personal property may be considered as a lesser included offense, but does not name the higher offense. See CJI2d 31.4(1). The trial court disagreed that CJI2d 31.4 was applicable to this case because (1) the charged offense of arson of a dwelling, MCL 750.72, includes among its elements the burning of the "contents" of the dwelling, and (2) the burning of personal property statute, MCL 750.74, expressly excludes from its scope any property encompassed by MCL 750.72. Accordingly, the trial court declined to instruct on the lesser offense of burning personal property. However, the court did allow the jury to consider two other lesser offenses distinguished by the value of the property, felony preparation to burn and misdemeanor preparation to burn. See MCL 750.77. Defendant was nonetheless convicted as charged, and ultimately sentenced to a minimum term of fifteen years.

On appeal, defendant again argues that the five year increase in his minimum sentence was the result of counsel's failure to provide the objectively reasonable assistance and that, therefore, the trial court abused its discretion in denying his motion for resentencing on that ground. However, the post-trial record developed pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), does not support defendant's argument on appeal.

At the *Ginther* hearing, counsel for defendant testified that, in advising defendant regarding withdrawal of his plea, he noted that the trial court had already reviewed defendant's history and the facts of the case in determining the ten year sentence, and that, therefore, if defendant went to trial and lost, the court would be "hard pressed" to give defendant a longer sentence. Counsel further testified that he told defendant that if he chose to go to trial, counsel's planned defense would be that defendant never intended to burn a dwelling, but rather only a sweater, which he stomped out before leaving the apartment. Counsel testified that given defendant's videotaped statement to police, his plan was to minimize defendant's culpability. Counsel further indicated that he believed he could convince the jury that defendant was guilty only of burning personal property, MCL 750.74. However, when the trial court refused to

[1] *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

instruct on that offense, counsel told defendant that he could either accept the earlier plea offer of ten years, or proceed with the trial. Counsel testified that he also advised defendant that if he chose the latter option, counsel would argue to the jury that although the court was not going to instruct on the lesser offense of burning personal property, "that's what you did and if there's not a charge out there that fits it, then they should find you not guilty." According to counsel, defendant opted to proceed with the trial and was "very, very, happy with the way the case went to the jury."

Consistent with counsel's testimony, defendant testified that after hearing counsel's "ways of winning the trial," he opted to reject any further plea discussions and continue with trial. Although defendant further testified that counsel expressly informed him that even were he to be convicted of the charged offenses the trial court would likely not sentence him to any more than the original ten years, defendant acknowledged on cross-examination that he understood at that time that counsel could not "guarantee" what sentence the trial court would ultimately impose, and that he knew his sentencing guidelines range provided for a minimum term of up to 17 ½ years.[2]

On the basis of the foregoing testimony, the trial court concluded that defendant was not denied the effective assistance of counsel because defendant wished to proceed to trial in hopes of benefiting from a "jury nullification" strategy to seek full acquittal on the charges. We find no error in this decision.[3] The record does not factually support defendant's claim that his decision to withdraw and then later forgo the option of reinstating his plea was the result of erroneous advice. The record indicates that defendant was presented with various choices and ultimately opted to proceed with trial in the hope that his nullification strategy would be successful. Defendant has not shown that trial counsel's performance was so deficient that it denied him the effective assistance of counsel. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994); see also *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996) ("The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel"). Accordingly, the trial court did not abuse its discretion in denying defendant's motion for resentencing.

II. Multiple Convictions

Defendant argues that he was improperly convicted of multiple counts of arson for a single act of burning. We disagree. This Court recently addressed this issue in *People v Barber*, 255 Mich App 288, 295; 659 NW2d 674 (2003), wherein it held that the Legislature intended to punish as multiple offenses a single fire that engulfed three homes and, therefore, the defendant's "three convictions of arson . . . based on a single fire [did] not violate his right against double jeopardy." The Court reasoned that each structure was entitled to protection from burning and therefore each formed the basis for a "unit of prosecution." *Id*. at 293-294, citing *People v*

[2] We note also that the trial court twice reminded defendant of this fact at the hearing to withdraw his plea.

[3] We do not imply that "jury nullification" is endorsed by Michigan law. See *People v St. Cyr*, 129 Mich App 471, 473-474; 341 NW2d 533 (1983).

Wakeford, 418 Mich 95, 107; 341 NW2d 68 (1983). Accordingly, defendant was properly convicted of forty-one counts of arson based on a single fire that destroyed forty-one apartment units.

We affirm.

/s/ Richard A. Bandstra
/s/ Helene N. White
/s/ Pat M. Donofrio